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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948.

No. .....

RAY S. BERGER, doing business as Berger Sales Company,
PETITIONER,

VS.

CHARLES BRANNAN, Secretary of Agriculture, suing on behalf of the United States, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered on the 27th day of January, 1949 (R. page 53), for the reasons hereinafter stated. Within the time provided by the rules and on motion of the petitioner the Circuit Court of Appeals, on February 12, 1949, entered its Order extending the time for the filing of a petition for rehearing to and including February 28, 1949 (R. page 54). Within the time fixed the petition for rehearing was duly and regularly filed (R. pages 54-55).

On March 7, 1949, the petition for rehearing was denied by the Circuit Court of Appeals with the Honorable Orie L. Phillips, Chief Judge, dissenting (R. pages 55-56).

OPINION BELOW.

The Opinion of the Circuit Court of Appeals for the Tenth Circuit will be found at pages 49-53 inclusive, of the Record. The Opinion is not as yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Tenth Circuit, which is the subject of this review, was entered on the 27th day of January, A. D. 1949 (R. page 53). The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. par. 347 (a)).

THE QUESTIONS PRESENTED.

The unusual factual situation presented by the record poses three pertinent questions of first impression for determination:

(a) Is the trial Court authorized by virtue of Rule 16 of the Federal Rules of Civil Procedure to order and direct a defendant to prepare and make available to his adversary, before trial, a detailed, specific and particularizing statement of the facts upon which he will rely, at the trial, in order to defeat the suit?

(b) Is the trial Court authorized by virtue of the provisions of Rule 56 of the Rules of Civil Procedure to enter judgment summarily against a defendant who fails to supply to his adversary, before trial, upon Order of the Court, a detailed, specific and particularizing statement of the facts upon which he will rely in defense, at the trial, to defeat the allegations of the complaint?

(c) Does the failure of the defendant to supply to his

adversary, before trial, upon Order of the trial Court, a detailed, specific and particularizing statement of the facts upon which he will rely to defeat the allegations of the complaint, disprove, as a matter of law, a genuine issue of material fact urged in his answer?

THE RULES OF CIVIL PROCEDURE AND THE PRICE REGULATIONS INVOLVED.

The pertinent provisions of Rules 16 and 56 of the Federal Rules of Civil Procedure, and the pertinent provisions of Maximum Price Regulation 150 (9 F.R. 11003) and Maximum Price Regulation 421 (8 F.R. 9388) are set out at pages 25 to 29 hereof.

THE STATEMENT.

On June 24, 1947, Clinton P. Anderson, then Secretary of Agriculture, now succeeded by Charles Brannan, Respondent, pursuant to the authority vested in him by virtue of Executive Order No. 9841 (12 F.R. 2645) filed his complaint (R. pages 1-2) in the United States District Court for the District of Colorado, alleging that Ray S. Berger, Petitioner, in violation of the Emergency Price Control Act, as Amended and Extended (50 U.S.C.A.) and Maximum Price Regulation 421 (8 F.R. 9388) and Maximum Price Regulation 150 (9 F.R. 11003), sold and delivered in the regular course of his business, various and divers types and grades of rice for prices in excess of the lawful ceiling. In support of the complaint and as a part thereof, there was attached a compilation therein designated as "Exhibit A" (R. pages 3-7) which purported to show the dates of the alleged unlawful sales, the names of the purchasers, the invoice numbers, the sales prices, the alleged ceiling prices and the purported overcharges.

On November 7, 1947, the petitioner filed his answer to this complaint (R. pages 8-9) wherein he denied the pertinent allegations therein contained, and specifically disputed

that "Exhibit A" reflected the true factual situation since it did not take into account all of the items, such as freight, delivery, zoning and mark-up percentages, allowed and permitted to be added to the net cost by the pertinent sections of the regulations.

On the same day demand for jury trial of the issues thus raised was made in accord under the provisions of Rule 38 of the Rules of Civil Procedure (R. page 10).

Thereafter, and on December 3, 1947, the respondent caused to be filed his motion (R. pages 10-11) praying that the trial Court enter its Order directing and requiring the petitioner to "prepare a recapitulation similar to 'Exhibit A' showing the items in 'Exhibit A' that are admitted, and as to those that are not admitted, to show where and why the data in 'Exhibit A' is wrong, and also to show what the defendant contends the true facts are".

This motion was heard by the trial Court on February 12, 1948, and denied (R. page 11), but a pre-trial conference ordered for February 18, 1948. At the appointed time for such a conference, counsel met with the trial Judge (R. page 11) and were permitted to outline their respective theories of the issues raised in the pleadings (R. pages 12-18). Counsel for the respondent in support of the complaint stated in substance that under administrative subpena *duces tecum* (R. page 12), the investigators for the Office of Price Administration had procured the records, books and accounts of the petitioner, and from an audit thereof had compiled the data contained in "Exhibit A"; that it reflected the true factual situation and that he would stand upon it at the trial (R. page 12); that the books, records and accounts had been returned to the petitioner (R. page 12) although they had been previously copied and photostated (R. page 16).

On the other hand, counsel for the petitioner, in substance, stated that the pertinent price regulations define four separate and distinct types of wholesalers to which a different percentage mark-up was assigned, and that the lawful

sale price at which the commodity could be sold depended upon where he sold, how he sold, and to whom he sold (R. page 13); that under the regulations, after determining the class of wholesaler to which the petitioner belonged and the classification of the buyer to whom he sold, whether a wholesaler, an institutional user, an industrial user, or a retailer, he could lawfully add to the net price as reflected in a formula contained in the regulation varying sums for packaging, delivery, freight and zoning (R. pages 13-15); that in computing the lawful ceiling price in "Exhibit A" attached to the complaint, the respondent had failed to give proper credit for these items and therefore it was incorrect (R. page 14).

For the purpose of eliminating unnecessary proof, counsel for the petitioner then admitted that there was no dispute of fact with respect to the names of the purchasers, the invoice numbers and the sale prices as were reflected in "Exhibit A" (R. pages 17-18). Counsel also advised that he would have available at the time of the trial the original records and would make them available several days prior thereto to counsel for the respondent (R. page 17).

At this point in the conference, the trial Judge, on his own motion (R. pages 14-16) and over the objection of the petitioner (R. page 16) ordered and directed that a compilation be prepared by the petitioner specifically illustrating the items which were claimed to have been omitted from the government's "Exhibit A", the same to be filed with the Clerk of the Court and a copy served upon counsel for the respondent (R. pages 15-16).

The legal reasoning assigned by the trial Court for this action may, for the purposes of convenience, be summarized as follows:

(a) The pre-trial procedure authorizes the court to order the defendant to disclose his defense (R. page 16);

(b) The information used is contained in the records of the defendant and therefore the duty to supply it rests on him (R. page 14);

(c) The burden of proof rests upon the defendant (R. page 16).

Thereafter, a Pre-Trial Conference Order was prepared and signed by the Court which incorporated the above and foregoing (R. pages 19-20) and the parties instructed to prepare for trial to a jury (R. page 18).

The sixty-day period fixed by the trial Court for the filing and service of the compilation to be prepared by the petitioner having expired, the respondent, on April 28, 1948, filed his motion for summary judgment (R. pages 24-25) alleging that although a question of fact originally existed, since the petitioner had failed to file the compilation ordered by the Court within the prescribed time limitation, impeaching the correctness of "Exhibit A" attached to the complaint, the computations therein contained stood admitted as true (R. page 25).

On May 10, 1948, the petitioner filed his verified motion (R. pages 27-28) praying that the Court enter its Order allowing and permitting the filing and service of the ordered compilation *nunc pro tunc*, and as grounds therefor urged that:

(1) The same could not be prepared in time because of the serious illness of the petitioner's wife, which required his continuous absence from his business; and

(2) That no damage had accrued to the respondent by reason of the delay.

The ordered compilation was tendered with the motion (R. pages 29-35).

On May 26, 1948, the respective motions of the parties were simultaneously heard and determined. The motion of the petitioner was denied (R. page 42), and the motion for summary judgment was granted (R. page 43), the Court settling damages at Five Thousand Four Hundred Twenty-seven and Eighty-three Hundredths Dollars ($5427.83) without

receiving any proof attaching the amount (R. page 43) and upon the grounds that:

> "The Court: I know it but the Court has already ruled and don't find anything in dispute here. The Court is of the opinion that the case has been unnecessarily delayed by the defendant's failure either to admit the government's case, or else to show what was wrong with it. There is nothing in the record as it now stands which indicates anything wrong with the government's petition, so judgment will go for the amount indicated." (R. page 43.)

In accordance with Rule 73 of the Rules of Civil Procedure appeal was duly and regularly filed and prosecuted in the Circuit Court of Appeals for the Tenth Circuit. On January 27, 1949 (R. page 49) that Court affirmed the action of the trial Court and caused to be filed the opinion (R. pages 49-53) which is the subject of this attack.

THE REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

It is respectfully submitted that for the following reasons this Honorable Court should allow a writ of certiorari to issue:

(1) The Circuit Court of Appeals decided an important question of first impression involving the construction of Rule 16 of the Federal Rules of Civil Procedure which has not been, but which should be settled by this Court, since its decision departs from the accepted and usual course of judicial procedure so as to deny and deprive a defendant a substantive right granted in all civil actions.

(2) The Circuit Court of Appeals decided an important question of first impression involving the construction of Rule 16 of the Federal Rules of Civil Procedure which has not been, but should be, settled by this Court since it departs from the accepted and usual course of judicial procedure re-

quiring a defendant in a civil action to disclose to his adversary, before trial, his private memoranda, statements and the factual basis upon which he will rely at the trial to defeat the action.

(3) The Circuit Court of Appeals decided a federal question which so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision, in that the Circuit Court of Appeals affirmed the action of a trial Judge which strikes at and destroys the accepted theories of burden of proof and trial by jury.

(4) The Circuit Court of Appeals has decided an important question of federal law which permits the invocation of summary judgment against a defendant who fails, within the prescribed period, to supply to his adversary, before trial, a detailed, specific and particularizing statement of the facts upon which he will rely before a jury to defeat the allegations of the complaint.

(5) The Circuit Court of Appeals has decided an important question of federal law which permits the use of the summary judgment procedure to punish a defendant who fails, within the ordered time, to supply to his adversary, before trial, a detailed, specific and particularizing statement of the facts upon which he will rely before a jury in order to defeat the suit.

(6) The Circuit Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision, in that it allows and permits the allegations of a complaint in a civil action to be deemed as true unless and until the allegations therein contained are made to appear groundless by detailed, specific and particularizing facts supplied by the defendant to his adversary, before trial.

(7) The Circuit Court of Appeals has sanctioned and permitted the pre-trial procedure to be turned into a device

by which a litigant can make use of his opponent's preparation for trial.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(A) *THE TRIAL COURT WAS WITHOUT AUTHORITY TO ORDER THE PETITIONER TO PREPARE AND MAKE AVAILABLE TO HIS ADVERSARY, BEFORE TRIAL, A DETAILED, SPECIFIC AND PARTICULARIZING STATEMENT OF THE FACTS WHICH FORMED THE BASIS OF HIS PLEADED DEFENSES.*

The record is quite clear that the trial Judge, after permitting respective counsel in pre-trial conference to outline the factual situation surrounding their pleas, allegations, denials and defenses, *on his own motion,* directed and ordered the petitioner to supply to his adversary, before trial, a detailed, specific and particularizing statement, in writing, specifically illustrating wherein the compilation designated "Exhibit A" attached to the complaint, was incorrect and inaccurate (R. pages 15-16); and that when the petitioner failed to do this within the time fixed for compliance with the order, summary judgment was entered for the full sum reflected in the Exhibit (R. page 43).

This action on the part of the trial Judge is attacked upon the ground that it is wholly unauthorized under either Rules 16 or 56 of the Federal Rules of Civil Procedure and is a direct and positive denial of the substantive rights of the petitioner to have a determination of his cause in accordance with the orderly and established practice of going forward with the proof supporting his defenses only after a *prima facie* case has been established by the respondent.

Rule 16 of the Federal Rules of Civil Procedure was adopted by this Honorable Court in 1938 pursuant to the provisions of 48 Stat. 1064 (1934), (28 U.S.C., par. 723 (b)) (1940), and was designed as a procedural step in an effort to

dissipate the evergrowing dissatisfaction with the courts on account of the inordinate delay and expense so often connected with the trial of a lawsuit. *Eisman v. Goldwyn, Inc.*, 30 F. Supp. 436. The pre-trial conference which it authorizes is, however, not to be considered as a special proceeding. Nor can it be called a remedy. It is incidental to a remedy and is an episode in an ordinary proceeding taking place within an action as the result of digression from the established practice. *LaPlante v. Implement Dealers Fire Insurance Co.* 12 N. W. 2d 630. It is the summary of the case before trial. *United States v. Wood*, 61 F. Supp. 175. This must of necessity be its status for a conference cannot be demanded by a litigant as a matter of absolute right. *Glaspell v. Davis*, 2. F.R.D. 301, but where it is ordered by the Court its scope and achievements must remain within the bounds of the language of the Rule and depend for its success upon the voluntary cooperation of the attorneys and the parties.

Where a conference is ordered, attorneys, by the provisions of the Rule, are bound to attend or suffer punishment for contempt. *Daitz Flying Corp. v. U. S.*, 4 F.R.D. 372. This phase of the Rule is the only compulsory element contained in it. The meeting is arranged "*to consider*" simplification of issues, "*the desirability*" of amendments to pleadings and "*the possibility*" of obtaining admissions of fact. The phraseology employed by the framers of the Rule is suggestive only of voluntary action on the part of counsel and the parties. Voluntary cooperation is the underlying force which gives support to its purpose to remove every encumbrance to a speedy trial on simplified issues. Its underlying philosophy is that litigants, their attorneys and the Trial Court should, in an informal manner, approach each other and seek by fair and open methods the grounds upon which they differ. *Masten v. Gower*, 165 S. W. 2d 901. The seeking of the grounds upon which they honestly differ does not, however, authorize a forced disclosure of the facts upon which their differences rest. The issues are not synonymous with the facts which bring them into existence.

The pre-trial conference is not a trial of the cause, nor can it, or should it, be made the vehicle through which an attorney may be required to surrender a substantive right of his client under the threat that if he does not, summary judgment for his failure to do so will follow. True, that he should honestly disclose all of the legal issues and defenses which he intends to urge at the trial so that surprise as a trial tactic may be eliminated, but beyond that his duty does not require him to go. The pre-trial conference which the Rule authorizes is not to be turned into a device by which a litigant can make use of his opponent's preparation for trial. Nor should it prove a means or agency by which the orderly processes of the Discovery Rules may be circumvented. That the machinery for discovery before trial is adequately provided for by Rules 26-37, inclusive, of the Rules of Civil Procedure, requires no argument. By their use the parties, without burdening the Court, may learn for themselves the real and actual factual points in controversy. Under the Rules, any party, as soon as the issues are presented by the pleadings, has a right to examine the other party or the witnesses, or he may inspect, copy and photograph the pertinent documents or other physical evidence and thus obtain the factual information relative to the actual points in dispute which may not be disclosed by the pleadings.

At this point it is important to note that the Pre-trial Conference Order did not call for the production of any document or record in the possession of the petitioner. It required him to make calculations based upon the information contained in his records and on his impressions of the proposed testimony which his witnesses would give at the trial, in the light of his interpretation of the pertinent price regulations.

"Fishing expeditions" in the realm of facts are no longer frowned upon by the Courts; indeed, they are encouraged where they will enable the diligent to sift the issues for himself; but the discovery rules require and de-

mand diligence and industry on the part of the prober, and when counsel so applies himself it becomes unnecessary for a trial judge, sitting informally, to erroneously and arbitrarily abandon his role and take the initiative on behalf of one of the litigants.

While it is conceded that the trial Judge may take a hand in the preliminary investigation usually pursued at pre-trial conferences by direct interrogation of counsel or the parties, with a view toward eliminating issues or encouraging withdrawal of needless or groundless allegations or denials, or suggesting a basis for amicable settlement, he overreaches his authority and violates the scope and purpose of the Rule when he brings to bear the great weight of his high office to compel one of the parties to arm his adversary, before trial, with the specific facts upon which his defense is based. Not only does his unwarranted and unauthorized action penalize diligence and put a premium on laziness, but—more important—it shifts the burden of proof from the plaintiff to the defendant, in that it attaches full credence to the allegations of a complaint until the contrary is made to appear by a recital of the particular items and specific facts upon which the denials of the answer are based.

While we agree that the Rules of Civil Procedure should be accorded a broad and liberal treatment, they should not be interpreted so as to place in the hands of an opponent an instrumentality whereby he may ascertain in advance the evidence to be presented by his adversary and then shape his own case so as to meet it. Such a weapon is too easily the subject of abuse. A common law trial is, and always should be, an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary. The real purpose and the probable effect of the practice ordered by the trial Judge would be to put trials on a level even lower than a battle of wits.

Hickman v. Taylor, 329 U. S. 495; 67 S. Ct. 385; 91 L. Ed. 451.

The pre-trial order which is the subject of this attack cannot be justified upon the theory that it is a piercing of the issues to determine whether or not a factual question does in truth and in fact exist, but is rather a medium through which the petitioner was required to make a disclosure of his files which contained the factual basis of his defense, the failure of which would, *ipso facto,* cause judgment to be entered against him summarily. The trial Court was without authority to so distort the pre-trial procedure. The framers of the Rule intended no such authority. We find support for this position at Vol. 63 of the Reports of the American Bar Association for 1938 at page 534. The report of the committee, in its recommendations saw fit to meet this problem head-on, at page 549 of the report, in the following language: *"There is no need to compel counsel to disclose the details of their proof in any case in which they prefer not to make such disclosure before trial."* (Italics Supplied)

In *O'Malley et al v. Chrysler Corp.* (Seventh Circuit) 160 F. 2d 35, the Circuit Court of Appeals had before it the appealability of an Order of a District Judge compelling and requiring a defendant to supply to the plaintiffs in a portal-to-portal action, a compilation or computation of time which each employee clocked in and out each day, the amount of time for which he was paid, the rate of pay, the amount of time he was shown by the clock records to be upon the defendant's premises over and above the time paid for, the total amount of overtime paid to him, and the total amount of overtime not paid to him. The Order to compile was procured on the motion of the plaintiffs under the discovery rules. Although the majority of the Court held that no appeal would lie over such an Order because of its preliminary or interlocutory nature, all of the Judges agreed that the Order was erroneous and improperly entered.

ally in pretrial conference, to place a halo of infallibility about the person of counsel for the government or the complaint which he is privileged to file on behalf of his client.

It cannot be succesfully argued that because the books, records, accounts and other data made available to the respondent, in obedience to his subpena *duces tecum,* had been returned to the petitioner and were on the date of the pre-trial conference in his possession, altered the situation for it is admitted that the respondent had copied and photostated them; and further that counsel for the petitioner had offered to make the originals again available for re-examination and re-audit before trial.

Nor should this Honorable Court be impressed with the legal reasoning assigned by the Trial Judge for his action upon the theory that the burden of proof rests upon the petitioner, for a cursory examination of the answer (R. pages 6-8) and counsel's discussion at the pre-trial conference (R. pages 16-20) will immediately dispel any doubt with respect to the nature of the defense. No affirmative defense of any nature was pleaded; accordingly the burden of proof to establish each and every essential and material allegation of the complaint rested upon the respondent.

The Opinion of the Circuit Court of Appeals for the Tenth Circuit and the judgment entered pursuant thereto is a serious departure from the accepted and usual course of judicial procedure because it sanctions an Order requiring a defendant in a civil action to disclose to his adversary, before trial, his private memoranda, statements, and the factual basis upon which he will rely at the trial to a jury to defeat the action. Such a sanction strikes at the very root of our jurisprudence and denies to a defendant a substantive right granted in all civil actions. This decision is an important question of first impression involving the construction of Rule 16 of the Federal Rules of Civil Procedure which has not been, but which should be, settled by this Court and for this reason a Writ of Certiorari should issue to review that judgment.

(B) *THE TRIAL COURT IS NOT AUTHORIZED BY RULE 56 OF THE RULES OF CIVIL PROCEDURE TO ENTER JUDGMENT SUMMARILY AGAINST A LITIGANT WHO FAILS TO SUPPLY TO HIS ADVERSARY, BEFORE TRIAL, A DETAILED, SPECIFIC AND PARTICULARIZING STATEMENT OF THE FACTS UPON WHICH HE WILL RELY AT THE TRIAL TO DEFEAT THE SUIT.*

A study of Rule 56 of the Federal Rules of Civil Procedure will immediately reveal that it is a procedural device designed to pierce the formal allegations of the pleadings to determine whether there is some material and genuine issue of fact to be tried. The Rule justifies judgment only when the pleadings, depositions, admissions and affidavits on file, if any, clearly show that no genuine issue as to any material fact exists so as to entitle the moving party to judgment as a matter of law. Summary judgment ought not to be given unless the truth is clear, *Port of Palm Beach v. Goethals,* 100 F. 2d 706, and upon the record the Court can see that the trial of the action "will be a useless form", *Saunders v. Higgins,* 29 F. Supp. 326. The Rule prescribes the means of making an issue; the issue made, as prescribed, the right to trial by jury accrues. *Fidelity and Deposit Co. of Md. v. United States,* 187 U. S. 315; 23 S. Ct. 120; 47 L. Ed. 194. When the moving party is the claimant, his pleadings, the depositions and admissions on file, together with the affidavits, if any, must establish his claim and negative the defenses and denials asserted by the adverse party, *Whiteman v. Federal Life Insurance Co.,* 1 F.R.D. 95; *Philip Fleming v. Phillips,* 35 F. Supp. 627.

The Rule was intended to provide against the vexation and delay which come from the formal sitting for trial of those cases in which there is no substantial dispute or issue of fact. It was not intended to, and should not be used as a substitute for the regular trial of cases in which there are disputed issues of fact upon which the outcome of the

litigation depends, *Blood v. Fleming*, 161 F. 2d 292; and the Trial Courts have been continuously admonished to exercise the greatest caution in awarding summary judgment, *Metal Furniture Co. v. U. S.*, 149 F. 2d 130; *Hawkins v. Frick-Reid Supply Co.*, 154 F. 2d 88, because it is a drastic remedy and should require strict compliance with its prescribed conditions, *Parmelee v. Chicago Eye Shield Co.*, 157 F. 2d 285.

A reading of the Transcript of the Record at pages 41-43, inclusive, will clearly indicate that summary judgment in the case at bar was entered not because the trial Judge was convinced that a genuine and material issue of fact was lacking, but because: (1) "The Court is of the opinion that the case has been unnecessarily delayed by the defendant's failure either to admit the government's claim or else to show what was wrong with it * * *." (2) "This case has been delayed and there is no reason why it couldn't be settled originally on the Exhibit which the government got from your books * * *."

Summary judgment was entered by the trial Court in the instant case because the petitioner did not affirmatively negative by proof the allegations contained in the complaint at the pre-trial conference. Judgment followed because the petitioner had failed, to the Court's satisfaction, to bear the burden of proving the falsity and inaccuracy of the respondent's case. The result reached necessarily required the trial Court to try the issue of fact passing on questions of credibility and the weight of the evidence. The summary judgment procedure was thus perverted into a trial of disputed questions of fact. It is respectfully submitted that no duty existed on the part of this petitioner to "either admit the government's case or else show what was wrong with it * * *." It must be remembered that the petitioner in his answer denied that there is any amount due and owing to the respondent; and he is entitled to have that issue tried by jury.

Likewise, neither the pre-trial conference nor the sum-

mary judgment procedure authorizes a Trial Judge to enter judgment against a litigant because he fails to yield to judicial prodding in his attempt to force an amicable adjustment of the case. The summary judgment procedure is not designed as a vehicle to punish when a litigant fails to settle his case "on the Exhibit which the government got from your books."

It is not the function of the trial Judge, upon a motion for summary judgment to try the issues of fact, if a factual situation is presented and all doubt as to the existence of a genuine issue must be resolved against the moving party, citing *Hawkins v. Frick-Reid Supply Corp.*, 154 F. 2d 88; *Parmelee v. Chicago Eye Shield Co.*, 157 F. 2d 582. The purpose of the precedural rule is to pierce the formal pleadings to determine whether a genuine, material, factual issue exists, but not to try that issue, *Miller v. Miller*, 122 F. 2d 209. The burden of proof is on the moving party to establish that a genuine factual issue is lacking, *Parmelee v. Chicago Eye Shield Co., supra.*

To illustrate that the pleadings, the admissions, the affidavits and the exhibits contained in the record do present a factual issue which is material to the outcome of the lawsuit, we call attention to the fact that respondent's attorney, at the pre-trial conference insisted that the data contained in "Exhibit A" attached to the complaint was correct and that he intended "to stand" upon it at the trial (R. pages 12-13). This statement clearly and unequivocally formulated the theory of the government's case and set the pattern and shaped the proof upon which it relied to support the allegations of the complaint. On the other hand, counsel for the petitioner insisted that the regulations define four separate and distinct types of wholesalers to which a different percentage mark-up was assigned by the Regulation; that the lawful sale price would depend upon whom he sold, where he sold, and how he sold; that under the Regulations, after determining the class of wholesaler to which the petitioner

belonged and the classification of the buyer to whom he sold, i.e., wholesaler, institutional user, industrial user or retailer, he could lawfully add to the net price varying sums for packaging, delivery, zoning and freight; and that in computing the lawful selling price as reflected in "Exhibit A" attached to the complaint the compiler had failed to give proper credit for these items, and that therefor it was incorrect. Since the petitioner could make the additions only if he had performed the services called for, the issue then raised presented a material and genuine issue of fact upon which reasonable men could differ. If such was the case summary judgment must necessarily be denied. *Ramsauer v. Midland Valley Railroad Co.*, 135 F. 2d 101.

The gist of the petitioner's defense to the complaint throughout the entire proceedings (see Transcript of Record, pages 13, 14, 15 and 16) has been a challenge to the correctness of the data and computations contained in "Exhibit A" attached to the complaint for the reasons:

First: That the compiler had not taken into account all of the necessary elements required in a determination of computations in cost, such as packaging, freight, delivery and zoning; and

Second: That he had not allowed the proper percentage mark-ups allowed by the Regulations by reasons of sales to the different classifications of buyers;

so that in accordance with Sections 3, 4, 14, 21 and 22 of Maximum Price Regulation 421 the correct ceiling price could not be ascertained.

It is respectfully submitted that a determination of the "net cost" under the Regulations must necessarily be a computation of three component parts:

(1) What the petitioner had to pay "For the most recent delivery of the item before August 5, 1943"; plus,

(2) Additions for packaging, freight, delivery and zoning; multiplied by,

(3) The mark-up allowed by Table A contained in the Maximum Price Regulation for the particular class of buyer.

It is evident therefore that the computation of the ceiling price is not a question of law but one of fact, for a computer must have at hand the price of the item most recently purchased before August 5, 1943; he must know as a matter of fact the particular type of package in which the rice is sold; and he must ascertain from the surrounding facts the classification of the buyer. This is possible only by a knowledge of the buyers business operations. And, lastly, he must know where it was sold and how it was delivered. These are questions of fact which must be ascertained from extraneous evidence for they are not contained in the books, records and accounts required to be kept by Section 6 of Maximum Price Regulation 150.

The Pre-trial Order which is the subject of this attack unequivocally commanded the petitioner to supply to the respondent, before trial, the necessary, essential and pertinent elements which went into the composition of the ceiling price. This we submit is tantamount to a shifting of the burden of proof and had the effect of turning the pre-trial procedure into a device by which a litigant could make use of his opponent's preparation for trial, and by which he was compelled either to reveal the facts upon which his defense is based or suffer judgment summarily.

An examination of the record will disclose that the Court entered judgment summarily for Five Thousand Four Hundred Seventy-two Dollars and Eighty-three Cents ($5,472.83) without requiring any proof whatsoever of the damage suffered. This was taking the allegations of the complaint with respect to damages at their face value. The action is directly contra to the holding of the Circuit Court of Appeals for the Tenth Circuit in *McRae v. Creedon*, 162 F. 2d 989, wherein Judge Murrah speaking for the Court, at page 992, said: "The Rule for Summary Judgment clearly contemplates a full hearing on the amount of damages in the event

of a judgment therefor. The amount of damages is always an open factual question * * *." The requirements of a "full hearing" referred to by Judge Murrah are not met by an abstract, theoretic, brief affidavit supplied by an interested witness.

In this connection, may we respectfully call attention to the fact that the clear and unequivocal language of Rule 56 (e) of the Federal Rules of Civil Procedure requires that supporting affidavits show upon their face that the facts therein recited would be admissible in evidence; that they are made on the personal knowledge of the affiant; and that he is competent to testify to the matters stated therein. Documentary evidence referred to by the affiant must be attached to the motion and served therewith.

The Circuit Court of Appeals for the Eighth Circuit, in *Walling v. Fairmount Creamery,* 139 F. 2d 318, puts the rule in the following language: "When affidavits are offered in support of a motion for summary judgment they must present admissible evidence and must not only be made on the personal knowledge of the affiant but must show that the affiant possesses the knowledge asserted * * *. When written documents are relied on they must be exhibited in full; a statement of the substance of written instruments or of affiant's interpretation of them, or mere conclusions or restatements of allegations of the pleadings are not sufficient."

This Honorable Court in *Sartor v. The Arkansas Natural Gas Corp.,* 321 U. S. 620; 64 S. Ct. 724; 88 L. Ed. 967, put a further limitation on such depositions. It there held that "the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact."

With the requirements of the Rule and the decided cases in mind, we pass now to the task of analyzing the affidavit of John B. O'Malley (R. page 26) attached to the motion

for summary judgment, and which apparently is relied upon as the evidentiary basis for its judgment by the Court below. After reciting that he is presently employed as an administrative assistant in the Bureau of Reclamation he deposes that during the years 1944-1947 he was employed as "Supervisor of Legal Investigations of the Office of Price Administration" and that the investigation was performed under his direct control and supervision. The affiant deposes that he examined the invoices, the freight bills and other data presented, from which he compiled "Exhibit A" attached to the complaint. It is obvious that a full, complete, correct and true audit requires the skill and experience of one trained in that work. Mr. O'Malley's affidavit does not disclose his experience as an auditor or accountant, but satisfies itself with the recitation that he was employed as a supervisor of legal investigations. The requirements of the Rule make it imperative that affidavits offered in support of a motion for summary judgment must present admissible evidence and must be made only on the personal knowledge of the affiant, and must show that the affiant possesses the knowledge asserted. The affidavit does not present admissible evidence but reflects only the affiant's interpretations of the records and his conclusions thereon. The written documents on which he relies for his interpretations and the conclusions are nowhere attached and have not been served. Indeed, they are not even described specifically. That he is an interested party within the scope of *Sartor v. The Arkansas Natural Gas Corp.* case, *supra*, needs no argument. It is admitted that he is still employed by the government. The affidavit at best rises to the level only of the affiant's interpretations of the written documents which he examined, and from them concludes as a matter of law that the charges and overcharges are compiled correctly in accordance with the pertinent Maximum Price Regulations. No where in the computations contained in "Exhibit A" attached to the complaint is the petitioner favored with the information which of necessity must go into his "net cost" or into the classifica-

tion of the purchasers so that proper percentage mark-ups may be applied. Accordingly the correctness of the computations made and contained in the Exhibit could not be specifically denied or disputed by this petitioner except by cross examination of the computer.

The Circuit Court of Appeals in affirming the judgment of the District Court for the District of Colorado has decided a federal question of first impression which permits the use of the summary judgment procedure to punish a defendant who fails within the ordered time to supply to his adversary, before trial, a detailed, specific and particularizing statement of the facts upon which he will rely before a jury in order to defeat the action, and in so holding allows and permits the allegations of a complaint in a civil action to be deemed as true unless and until the allegations therein contained are made to appear groundless on the part of his opponent. It sanctioned and permitted the pre-trial and summary judgment procedures to be turned into a device by which a litigant may procure his opponent's preparation for trial.

CONCLUSION.

It is respectfully submitted that for the reasons hereinabove argued, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

THE PERTINENT SECTIONS OF RULES OF CIVIL PROCEDURE AND M.P.R. 421 AND M.P.R. 150.

Rule 16 of the Federal Rules of Civil Procedure provides (Fed. Rules Ser. Current Material, p. 46):

> "In any action, the Court may in its discretion, order the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action; * * *"

Rule 56 of the Federal Rules of Civil Procedure provides (Fed. Rules Serv. Current Material, p. 126):

> "(a) For claimant. A party seeking to recover upon a claim, * * * may at any time after the expiration of 20 days from the commencement of the action or after service of motion for summary judgment by the adverse party, move with or without supporting affidavit for a summary judgment in his favor upon all or any part thereof;
>
> "(c) Motion and Proceedings thereon: The motion shall be served at least 10 days before the time fixed for hearing * * *. The judgment sought shall

be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are usually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

The record provisions of M. P. R. 150 are included in Section 6 thereof (9 F.R. 11003) and provide:

"Every person shall keep for so long as the Emergency Price Control Act of 1942, as amended, shall remain in effect, a complete record of each sale or

purchase subject thereto, showing the date thereof, the names and addresses of the buyers, the price contracted for, paid or received, and the quality and quantity of the furnished rice or rice milling by-products sold or purchased.

"Upon demand every seller shall submit such records to the Office of Price Administration and keep such further records as the Office of Price Administration may from time to time require."

The pricing provisions of M.P.R. 421 (8 F.R. 9388) provides as follows:

"Section 2—How to determine to which class your business belongs—(a) What wholesalers are covered—Your business is classified under this regulation if you are a wholesaler, the larger part of your business is the purchase of food products for resale and the distribution from your warehouse without materially changing their form, and all such food products are sold to independent retail stores or to commercial, industrial or institutional users * * *."

"(b) Classes of wholesalers covered by this regulation are defined as follows: Class 1—Retail Owned Cooperative Wholesaler—You are a retailer-owned Cooperative wholesaler if you are either a non-profit organization or corporation, fifty per cent of the stock of which is owned by your retailer customers.

"Class 2—Cash and Carry Wholesaler—You are a cash and carry wholesaler if you are not in Class 1 and the larger part of your business consists of the sale of food products without delivery to

"Class 3—Service Wholesaler—You are a service wholesaler if you are not in Class 1 and the larger part of your business consists of the sale of food products to independent retail stores and if you deliver to all customers in a base zone without charge.

"Class 4—Institutional Wholesaler—You are an institutional wholesaler if you are not in Class 1 and the larger part of your business consists of the distribution of food products to commercial, industrial and institutional users.

"If you do business in more than one of the ways outlined above see Sections 17, 18, 19 and 20."

Section 3 of M.P.R. 421 provides:

"Section 3—How and when you figure ceiling prices—(a) General Rule—Your ceiling prices for each item (that is for each kind, grade, brand, variety, container type and container size) of foods listed in Table A shall be the result of: (1) the 'net cost' you had to pay for the most recent delivery of the item to you before August 5, 1943, multiplied by (2) the markup figure given for it in Table A."

Section 4 of M.P.R. 421 provides:

"Section 4—Directions for applying the rule—(a) Net Cost—To figure your ceiling price, first find the 'net cost' of the item, based on its most recent delivery to you before August 5, 1943. Your 'net cost' will be the amount you paid your supplier less all discounts except the discount for prompt payment and sell and label allowance, plus all transportation charge you paid except local trucking and local unloading. Treat as a separate item, each kind, brand, grade, variety, container size and container type.

"(1) Your net cost must be figured on purchases of a customary quantity from a customary type of supplier delivered to your usual receiving point by a customary means of delivery * * *.

"(2) Figure the net cost of the unit in which you received delivery (i.e., per dozen, per case, per bag, etc.) to the nearest cent.

"(b) Markup—Turn to Table A to find the mark-up figure for the item given your class of wholesaler * * *.

"(c) Ceiling price. Next, multiply your 'net cost' by the markup figure in Table A for your class of wholesaler for the item being priced. The resulting amount will be your ceiling price * * *."

Section 14 of M.P.R. 421 provides:

"Section 14—Additions to 'net cost' for packaging—If you buy in bulk any item covered by this regulation and then package and sell it in cotton bags, inter lined coffee bags, transparent bags or cardboard containers you may add to your 'net cost' whichever of the following allowances applies:

"(a) 1½ cents for every such bag or container with a net weight of less than 2 pounds.

"(b) 2 cents for every such bag or container with a net weight of 2 pounds or more but less than 5 pounds.

"(c) ½ cent per pound for every such bag or container with a net weight of 5 pounds or more."

Section 21 of M.P.R. 421 provides:

"Section 21—Addition allowed for delivery by Class 1 and Class 2 wholesalers. (a) If you are a retailer-owned cooperative, wholesaler or a cash and carry wholesaler and you have customarily added a set amount or percentage to your sale price for delivering to retailer, you may, in figuring your ceiling price for each item you deliver to retailers, add to your ceiling price such set amount or percentage."

Section 22 of M.P.R. 421 allows additions for deliveries outside of base zone.